Questions have been raised regarding the proposed endangered species consultation process outlined in the attached Florida 404 program flow chart. These questions center on whether the process can indeed authorize a project in accordance with Endangered Species Act Section 7, and if so, does that authorization create unintended consequences for permittees subject to the National Pollution Discharge Elimination System program or Clean Air Act, Title V permitting program. Given that a broad cross section of Florida interests are (or will be) subject to all three of these state permitting programs, the answer to these questions are critical to protect Florida interests.

**Question Presented**

1. Can a permittee under a state-assumed 404 permitting program obtain Endangered Species Act (ESA) authorization through the Section 7 consultation process?

2. Can the Environmental Protection Agency (EPA), in carrying out its oversight responsibilities under a state assumed Clean Water Act, National Pollution Discharge Elimination System (NPDES) program, be required to enter into Section 7 consultation where a permitted activity may affect threatened or endangered species (listed species)?

3. Can the EPA, in carrying out its oversight responsibilities under a state assumed Clean Air Act (CAA), Title V permitting program, be required to enter into Section 7 consultation where a permitted activity may affect listed species?

**Short Answer**

1. Yes. EPA's discretionary federal involvement in authorizing the issuance by a state agency of a 404 permit under an assumed 404 permitting program for a project that is reasonably likely to affect threatened or endangered species constitutes federal "agency action," and EPA, therefore, enters into Section 7 consultation with the Fish and Wildlife Service to ensure that such agency action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. A project applicant can obtain necessary incidental take authorization by implementing all conditions or reasonable and prudent measures established in the Incidental Take Statement. Doing so will enable applicants to comply with the take prohibitions in the ESA as provided in Section 7 of the Act.

2. No. EPA's review of a state-issued NPDES permits is not "agency action" and, therefore cannot trigger Section 7 consultation. Federal regulations and case law support this conclusion. NPDES permittees can acquire ESA incidental take authorization by obtaining an Incidental Take Permit through the Section 10 permitting process.

3. No. EPA's review of a state-issued Title V permit is not "agency action" and, therefore cannot trigger Section 7 consultation. Federal regulations and case law support this conclusion.

## Discussion

1. Section 7 Consultation under a State-Assumed 404 Permitting Program

The Endangered Species Act (ESA) prohibits the "take" of a federally-listed threatened or endangered species (listed species). Any person that takes a listed species, either directly or indirectly (*i.e.*, through habitat modification) without the proper authorization could be found in violation of the ESA and subject to substantial civil and criminal penalties. The ESA currently provides two mechanisms for project applicants to obtain the necessary take authorization that may occur incidental to an otherwise lawfully permitted activity. One mechanism is the Incidental Take Statement (ITS) obtained through the Section 7 consultation process and the other mechanism is the Incidental Take Permit (ITP) obtained through the Section 10 permitting process. For various reasons beyond the scope of this memo, the preferred path for obtaining necessary ESA authorizations under Florida's 404 permitting program is the Section 7 consultation process.

The Section 7 consultation process authorizes the incidental take of listed species arising out of a federal "agency action" and is intended to "insure" that a federal agency action is "not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat." 16 U.S.C. § 1536(a)(2). Federal agencies are required to engage in consultation with either the Fish and Wildlife Service (FWS) or the Marine Fisheries Service (MFS) whenever (1) there is reason to believe an endangered or threatened species is present in the area affected by a federal action and (2) implementation of the action "may affect" the species or its critical habitat. 16 U.S.C. § 1536(a)(3); 50 C.F.R. § 402.14(a). Federal regulations further state that consultation requirements apply to "all actions in which there is discretionary federal involvement or control." 50 C.F.R. § 402.03.

Sufficient federal "agency action" exists under a state-assumed 404 permitting program to trigger Section 7 consultation through EPA's agency oversight responsibilities. EPA is required to review a proposed state 404 permit application if the permitted activity will result in a discharge of dredge or fill material that has the reasonable potential to affect listed species. 40 C.F.R. § 233.50. Under the 404 program, once EPA receives a copy of a 404 permit application from the state, EPA is required by statute to send that permit for review to FWS. See 33 U.S.C. § 1344(j). EPA can reasonably interpret this statutory provision to trigger Section 7 consultation. This interpretation is bolstered by EPA regulations. As provided in 40 C.F.R. § 233.50, whenever an "affect" determination is made, EPA makes an affirmative decision whether to approve, object, or require the permit to include certain mitigating conditions. EPA uses its discretion to ensure that the approval of a state's issuance of a 404 permit is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. States that assume the 404 permitting program from the Corps are prohibited from issuing permits if the state receives an EPA objection or requirement for a permit condition to a permit application unless the state permitting authority has taken the steps required by EPA to eliminate the objection. 40 C.F.R. § 233.50(f).

Federal "action" for purposes of the ESA is defined very broadly in 50 C.F.R. § 402.02 to mean all activities of any kind authorized, funded, or carried out, in whole or in part, by Federal

agencies. The courts have also consistently held that the term "agency action" is to be interpreted broadly. *See Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988). Under a state-assumed 404 program, if a permit may affect listed species, the state agency is required to submit the permit application and all supporting documents to EPA for review. EPA then makes an affirmative, discretionary decision whether to authorize the state to issue the state 404 permit or not authorize the permit through a written objection. If EPA objects, the state is prohibited under 40 C.F.R. § 233.50 from issuing the state 404 permit. Thus, it would be a reasonable interpretation by the FWS that Section 7 consultation with EPA is necessary to ensure that EPA's decision to authorize the issuance of a state 404 permit is not likely to jeopardize the continued existence of a listed species.

The FWS is given great judicial deference in the manner it chooses to interpret and implement its Section 7 regulations. It is a well-established principle of law that an agency's construction of a statute it is entrusted to administer is entitled to great judicial deference if the construction is reasonable and does not conflict with congressional intent. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The courts would be hard pressed to rule that FWS's determination that EPA's discretionary federal involvement in Florida's 404 permitting process is an unreasonable implementation of its regulations where listed specials are deemed to be affected.

The 9th Circuit in *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012), established a two-pronged inquiry for determining when there is an "agency action" under the ESA. First, the court asks "whether a federal agency affirmatively authorized, funded, or carried out the underlying activity." *Id.* at 1021. Second, the court determines whether the agency had some discretion to influence or change the activity for the benefit of a protected species. *Id.* The court also held that the ESA's use of the term "agency action" is to be construed broadly. Under this two-part analysis, where a proposed project is determined to likely affect listed species, EPA's discretionary decision to authorize a state to issue a 404 permit is "agency action" for purposes of Section 7 of the ESA. First, EPA in approving the permit or approving with conditions and not objecting to the state 404 permit is authorizing the activity because if EPA does object, then the state cannot issue the 404 permit authorizing the activity. In other words, although the state -- and not EPA -- issues the permit, EPA affirmatively authorizes the permit's issuance in accordance with its mandatory review responsibility of any permit with the "reasonable potential for affecting endangered or threatened species." Secondly, EPA has discretion to influence or change the activity for the benefit of a listed species through its authority to add permit conditions or limitations where listed species may be affected by a state-issued 404 permit. Thus, EPA's actions under a state-assumed 404 permitting programs where listed species are likely to be affected meets the two-part inquiry established by the 9th Circuit and is federal "agency action" under the Section 7 of the ESA.

In addition, 40 C.F.R. § 233.50(e) authorizes EPA to object to state-issued 404 permit applications that are outside the requirements of the 404(b)(1) guidelines. The 404(b)(1) guidelines are established in 40 C.F.R. Part 230 and one of the guidelines provides that "[n]o discharge of dredged or fill material shall be permitted if it jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act or results in likelihood of the

destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce to be a critical habitat under the Endangered Species Act." 40 C.F.R. § 230.10(b). Therefore, EPA, in order to fulfill the requisite oversight responsibilities, decides whether to authorize a state-issued 404 permit that may affect a listed species and ensure that the proposed activity does not jeopardize the continued existence of listed species. The only place in the law that provides for a jeopardy determination with respect to listed species is in Section 7 of the ESA and the accompanying implementing regulations. Therefore, the EPA will be required to engage in Section 7 consultation where EPA reviews a state 404 permit application under 40 C.F.R. § 233.50 to determine whether the proposed project complies with the 404(b)(1) guidelines and will not jeopardize the continued existence of listed species or critical habitat.

Once Section 7 consultation is complete, then the FWS will publish a Biological Opinion (BiOp) and ITS that includes reasonable and prudent measures to implement in order to reduce or mitigate impacts to listed species. The ITS may also include a certain number of species that may be taken incidental to the lawful activity. The BiOp and ITS provide project applicants the needed liability protection from claims arising under the ESA even though the activity is authorized pursuant to a state permit. Under FWS regulations, an ITS is provided with the BiOp whenever the permitting activity may incidentally take individuals of a listed species. If the action proceeds in compliance with the terms and conditions of the ITS, then any resulting incidental takings are specifically exempt from the prohibitions of section 4(d) or 9 of the ESA. 50 C.F.R. § 402.14(i)(v)(5). Any taking that is in compliance with the terms and conditions specified in a written ITS are exempt from the take prohibition of the ESA. 16 U.S.C.S § 1536(o)(2). Compliance with these terms and conditions is mandatory to qualify for the exemption from section 4(d) or 9 take prohibitions in the ESA. Thus, it is essential that the state incorporate these measures provided in the ITS into the state 404 permit.

2. Section 7 Consultation under a State-Assumed NPDES Permitting Program

EPA's status as an action agency under a state-assumed 404 permitting program does not create an incremental risk that a court will deem EPA an action agency under a state-assumed NPDES permitting program. The two permitting programs establish distinct oversight requirements. Under the 404 program, once EPA receives a copy of a 404 permit application from the state, EPA is required by statute to send that permit for review to FWS. See 33 U.S.C. § 1344(j). No similar requirement under the NPDES program requires EPA to share copies of state permit applications with FWS. *See* 33 U.S.C. § 1342(d); 42 U.S.C. § 7661d.

Further, the 404 assumption regulations specifically state that EPA reviews state 404 permit applications authorizing discharges that FWS determines may affect listed species. 40 C.F.R. § 233.51(b)(2). EPA can reasonably interpret its mandatory oversight responsibility to include consultation and affirmatively requiring the state to include permit conditions to ensure the project will not violate the ESA.

The NPDES regulations include no such oversight requirement with respect to permits that may affect listed species. Instead, NPDES regulations only provide that "the Regional Administer may make general comments upon, objections to, or recommendations with respect to proposed permits." 40 CFR § 123.44. Additionally, EPA's NPDES regulations list 9 criteria that an EPA

objection must be based on and none of these reference potential impacts to listed species. 40 C.F.R. § 123.44(c). These NPDES regulations indicate that EPA lacks the authority to review a state-issued NPDES permit based on potential impacts to listed species and the courts agree. See *Am. Forest & Paper Ass'n v. United States EPA*, 137 F.3d 291 (5th Cir. 1998). Another important distinction is that under the NPDES permitting program, EPA can waive the entire state notification requirement. Again, this is not allowed under the 404 state permitting program; EPA regulations specifically prohibit the Agency from waiving review of certain state 404 permits, including permits with the "reasonable potential for affecting endangered or threatened species." 40 C.F.R. § 233.51. Unlike a state-assumed 404 program, even where a proposed NPDES permit may affect listed species there is no EPA agency action involved to trigger Section 7 consultation and an applicant for an NPDES permit must instead obtain any necessary ESA incidental take authorization through the Section 10 permit process.

At least one federal district court affirms that EPA's oversight responsibilities under a state-assumed NPDES permitting program are not agency action under the ESA and, therefore, Section 7 consultation is not required. *See Or. Nat. Res. Council v. Hallock*, 2006 U.S. Dist. LEXIS 87070 (D. Or. 2006). The court in *Hallock* specifically ruled that "[t]he EPA's review of an NPDES permit or the failure to object to the permit does not constitute federal action which would trigger the ESA consultation requirement."

3. Section 7 Consultation under a State-Assumed Clean Air Act Title V Permitting Program

As with the NPDES permitting program, EPA is not required to engage in Section 7 consultation with the FWS as a result of fulfilling the Agency's Title V permit review responsibilities. Unlike permit review under a state-assumed 404 permitting program, state-issued Title V permit review is not "agency action" with respect to the ESA, and this legal certainty cannot be changed simply because consultation is performed under a completely separate regulatory Act. As noted above, under the 404 program, once EPA receives a copy of a 404 permit application from the state, EPA is required by statute to send that permit for review to FWS. See 33 U.S.C. § 1344(j). No similar requirement under the Title V program requires EPA to share copies of state permit applications with FWS. *See* 33 U.S.C. § 1342(d); 42 U.S.C. § 7661d.

Under a state-assumed Title V permitting program, EPA is only authorized to object to the issuance of any proposed permit that EPA determines is not in compliance with applicable requirements or requirements under 40 C.F.R. Part 70. 40 C.F.R. § 70.8. Unlike the EPA oversight requirements in 40 CFR 233.50, nothing in Part 70 requires EPA to review impacts to listed species. This is the same distinction that exists with the NPDES program and is why on one hand EPA's oversight duties under a state-assumed 404 permitting program can be "agency action" for purposes of the ESA, but on the other hand EPA's permit review responsibilities under a state-assumed Title V and NPDES programs are not "agency action." Only the 404 assumption regulations require EPA to make a determination as to whether a state-issued 404 permit will affect listed species and not jeopardize the continued existence of such species. In order to make such a decision, EPA consults with the FWS as provided in Section 7 of the ESA.

The EPA has even denied past third-party petitions requesting EPA to object to state Title V permits because the Agency did not engage in consultation with the FWS, stating that:

> "Since the ESA is not an applicable requirement of the CAA, it is not possible for the Petitioner to demonstrate that the permit is not in compliance with the CAA on the basis of a claim alleging noncompliance with the ESA. As a direct result of the ESA not being a part of the CAA, the claim raised by Petitioners that the EPA had an obligation to initiate or reinitiate consultation under the ESA is not properly raised... A petitioner must demonstrate that the *permit* is not in compliance with the requirements of the CAA before the EPA will object to the permit." *In the Matter of Gateway Generating Station Antioch*, 2014 EPA CAA Title V LEXIS 5 (E.P.A. October 15, 2014).

Also, in the case *Wild Equity Inst. v. United States EPA*, 147 F. Supp. 3d 853 (N.D. Cal. 2015) EPA argued and the court agreed that because the Title V permit was issued by the state-assumed permitting authority and not by the EPA, there is no federal action upon which petitioners can seek consultation. That fact, along with the fact that, as with NPDES permits, EPA has no authority to review/object/condition state-issued Title V permits based solely on potential impacts to listed species. This is the defining difference between other assumable EPA permitting programs and the 404 dredge and fill permitting program, and is why EPA can and is legally obligated to consult with the FWS under Section 7 of the ESA when making the affirmative, discretionary decision to object to or condition state-issued 404 permits because the permitted activity may adversely affect listed species.

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Based on the foregoing analysis, the EPA is authorized and legally obligated to consult with the FWS pursuant to their oversight responsibilities where a state 404 permit issued under a state assumed 404 permitting program is determined to have the reasonable potential for affecting endangered or threatened species. EPA engaging in Section 7 consultation under a state-assumed 404 permitting program, however, does not require EPA to engage in Section 7 consultation under other state-assumed permitting programs such as a state-assumed NPDES permitting program or Title V permitting program.

On a side note, there has been some mention of the potential NEPA obligations stemming from this work. Section 511(c) of the CWA states that no action of the EPA Administrator taken pursuant to the CWA shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, except for:

- Wastewater treatment construction grants under Title II of the Clean Water Act; and
- Issuance of NPDES permits for the discharge of any pollutant by a new source.

Therefore, actions taken by EPA pursuant to the 404 assumption regulations cannot be deemed a "major federal action" significantly affecting the quality of the human environment within the meaning of NEPA. See *Anchorage v. United States*, 980 F.2d 1320 (9th Cir. 1992). As such, the decision by EPA to approve a state's 404 assumption application is not subject to NEPA and EPA's review of a proposed state 404 permit application pursuant to the federal agency oversight regulations in 40 C.F.R. § 233.50 are also exempt from complying with NEPA. No aspect of Florida's proposal to assume the 404 permitting program changes this Congressional limitation on NEPA applicability.